IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

GIOVANI PALMA-ABARCA aka GIOVANNI PALMA, JORGE REYES MENDEZ,	**ORDER**
Petitioner,	
vs.	**Case No. 2:05CV974 DAK**
UNITED STATES OF AMERICA,	
Respondent.	

This matter is before the court on Giovani Palma-Abarca's ("Petitioner") pro se Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. On December 8, 2004, Petitioner pleaded guilty to violating 8 U.S.C. § 1326 (Reentry of a Previously Removed Alien). On March 28 2005, the court sentenced Petitioner to 57 months in prison and 36 months of supervised release.

Petitioner challenges his sentence as unconstitutional under *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005) because the court–rather than a jury–determined that Petitioner had been previously deported after an aggravated criminal conviction. Petitioner also contends that his counsel was ineffective because she failed to file a direct appeal.

In his Statement By Defendant In Advance of Plea, filed December 9, 2004, Petitioner admitted the following facts:

1. I am not a citizen or national of the United States. I am a native of Mexico.

2. I was removed form th United States on or about August 12, 2002.

3. After my removal, I knowingly reentered the United States an on September 1, 2004, I was knowingly present and was found in Juab County, Utah.

4. I reentered the United States without the consent of the Attorney General of the United States or the Secretary of th United States Department of Homeland Security, and I have not since obtained the permission to reenter.

5. My previous convictions include, but may not be limited to, the following: On April 4, 1997, California Municipal Court of San Diego, Assault with a Firearm on a Person, a felony . . . . On January 8, 2001, Superior Court of California, two counts of Inflicting Corporal Injury to Spouse/Co-habitant, two counts of Assault by Means to Produce Great Bodily Injury, Making a Terrorist Threat, and Dissuading a Witness fro Reporting a Crime . . . .

DISCUSSION

In *United States v. Dorris*, 236 F.3d 582 (10th Cir. 2000), a criminal defendant appealed his sentence, arguing that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), his prior convictions must be charged in an indictment and proven to a jury beyond a reasonable doubt. In *Dorris*, the Tenth Circuit noted that *Apprendi* carved out an exception for prior convictions and that "use of a prior conviction to increase a defendant's sentence does not implicate the same concerns as other sentencing enhancements because the defendant's previous conviction was accompanied by all the procedural safeguards required in a criminal prosecution." *Dorris*, 236

F.3d at 587-88. Thus, the Tenth Circuit determined that the "fact" of prior convictions need not be charged in an indictment and proven to a jury.

In *United States v. Moore*, 401 F.3d 1220 (10th Cir. 2005), the Tenth Circuit addressed whether its decision in *Dorris* remained good law in light of *Booker*. The Tenth Circuit recognized that *Booker* confirmed the prior conviction exception, stating:

> we reaffirm our holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt

Id. at 1223 (quoting *Booker*, 125 S. Ct. at 756).

The Tenth Circuit also addressed whether a characterization of a previous felony as "violent" is a fact that must be charged in an indictment and either admitted by the defendant or problem to a jury under a "beyond a reasonable doubt" standard. The court concluded that "[b]ecause determining whether a given felony constitutes a 'violent felony' is a question of law and not fact, the Sixth Amendment does not require that determination to be made by a jury." *Id.* at 1225. The court determined "for similar reasons that *Apprendi* and *Booker's* exception for prior convictions subsumes inquiries into whether a given conviction constitutes a 'violent felony.'" *Id.* Accordingly, "[i]t is a question of law whether a felony meets the statutory definition of a "violent felony," and such a question does not trigger the Sixth Amendment concerns addressed in *Booker*." *Id.* at 1225. The court in *Moore* also stated that, "[f]urthermore, determining whether a prior conviction was for a "violent felony" involves an inquiry intimately related to whether a prior conviction exists, and therefore falls within the prior convictions exception to the *Apprendi* rule. *Id.*

In this case, the same is true in regard to determining whether Petitioner had an "aggravated criminal conviction." Determining whether a given felony constitutes an aggravated criminal conviction is a question of law and not fact, and therefore the Sixth Amendment does not require that determination to be made by a jury.

Petitioner's ineffective assistance claim also lacks merit. To establish a claim for ineffective assistance of counsel, a petitioner must show: "(1) his counsel's performance was constitutionally deficient, and (2) his counsel's deficient performance was prejudicial." *United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995); *United States v. Glover*, 97 F.3d 1345, 1349 (10th Cir. 1996) (applying standard to sentencing proceedings and plea hearings). Because the court has concluded that *Booker* does not apply to the determination that a prior conviction constitutes an "aggravated criminal conviction," Petitioner cannot establish either of the required prongs.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 is DENIED.

DATED this 26th day of January, 2006.

BY THE COURT:

DALE A. KIMBALL
United States District Judge